No. 02-548

Supreme Court, U.S.
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In The

Supreme Court of the United States

CZARINA, LLC,

Petitioner,

v.

KEMPER DE MEXICO, COMPANIA DE SEGUROS, S.A., f/k/a SEGUROS LA TERRITORIAL, S.A.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in determining that California's statute of limitations barred registration and enforcement of the default judgment purchased by Petitioner?

CORPORATE DISCLOSURE STATEMENT
(Supreme Court Rule 29.6)

Respondent Kemper de Mexico, Compania de Seguros, S.A. (f/k/a Seguros La Territorial, S.A.) is a Mexican corporation licensed as an insurance company in Mexico. It is an indirect wholly-owned subsidiary of Lumbermens Mutual Casualty Company, an Illinois mutual insurance company ("Lumbermens"). As a mutual insurance company, Lumbermens has no stockholders, and therefore there are no publicly-held companies holding directly or indirectly any percentage ownership of Respondent.

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ADDITIONAL STATUTORY PROVISIONS INVOLVED

The California Code of Civil Procedure provides

§ 683.020.

Except as otherwise provided by statute, upon the expiration of 10 years after the date of entry of a money judgment or a judgment for possession or sale of property

(a) The judgment may not be enfored.

(b) All enforcement procedures pursuant to the judgment or to a writ or order issued pursuant to the judgment shall cease.

(c) Any lien created by an enforcement procedure pursuant to the judgment is extinguished.

§ 683.050.

Nothing in this chapter limits any right the judgment creditor may have to bring an action on a judgment, but any such action shall be commenced withing the period prescribed by Section 337.5.

§ 683.110

(a) The period of enforceability of a money judgment or a judgment for possession or sale of property may be extended by renewal of the judgment as provided in this article.

(b) A judgment shall not be renewed under this article if the application for renewal is filed within five years from the time the judgment was previously renewed under this article.

§ 683.130.

(a) In the case of a lump-sum money judgment or a judgment for possession or sale of property, the application for renewal of the judgment may be filed at any time before the expiration of the 10-year period of enforceability provided by Section 683.020 or, if the judgment is a renewed judgment, at any time before the expiration of the 10-year period of enforceability of the renewed judgment provided by Section 683.120.

(b) In the case of a money judgment payable in installments, the application for renewal of the judgment may be filed:

(1) If the judgment has not previously been renewed, at any time as to past due amounts that at the time of filing are not barred by the expiration of the 10-year period of enforceability provided by Sections 683.020 and 683.030.

(2) If the judgment has previously been renewed, within the time specified by subdivision (a) as to the amount of the judgment as previously renewed and, as to any past due amounts that became due and payable after the previous renewal, at any time before the expiration of the 10-year period of enforceability provided by Sections 683.020 and 683.030.

STATEMENT OF THE CASE

Petitioner ("Czarina") is trying to re-cast a question of state law as a federal constitutional issue. However, as the opinion of the Court of Appeals amply demonstrates, it decided this case based on its application of a California

statute to the facts as alleged by Czarina, and determined, not that the statute was unconstitutional, but that it did not apply to those facts. Nor did it create any conflict between the Circuits on any issue of federal law. The Court of Appeals simply affirmed the District Courts' holdings that the California statute of limitations barred Czarina's actions.

Czarina attempts to take advantage of the procedural confusion it created when it filed two entirely separate proceedings in the District Court relating to the same judgment. Although these two cases were consolidated for purposes of appeal and sought the same end result (enforcement of an ancient default judgment against La Territorial[1]), they were premised on distinct legal grounds and are not governed by the same statutory or case authority.

The default judgment at issue was originally entered against La Territorial by the United States District Court for the Southern District of New York on February 17, 1984. Over 14 years later, on May 14, 1998, Czarina purchased that judgment from the English liquidators of the original judgment creditor, Halvanon Insurance Company Ltd. ("Halvanon"). Czarina commenced the first proceeding on January 27, 1999, by registering the judgment in the United States District Court for the Southern District of California, pursuant to 28 U.S.C. § 1963 (the

[1] After the case had been briefed in the Court of Appeals, the original Respondent, Seguros La Territorial, S.A., was sold and renamed "Kemper de Mexico, Compania de Seguros, S.A.". Thus, in order to avoid confusion, the Respondent will be referred to herein as "La Territorial".

"Registration Action"). Czarina then sought to levy execution on funds in the possession of a California insurance broker, ADA VIS, which it alleged were the property of La Territorial.

ADA VIS resisted, however, contending that it was not holding any monies belonging to La Territorial; Czarina then initiated discovery and other proceedings in aid of execution. ADA VIS opposed these applications on various grounds, including the assertion that the Registration Action had been improperly commenced, since enforcement of the 1984 default judgment was barred by the applicable California ten-year statute of limitations.

On July 28, 1999, two days after ADA VIS first asserted its statute of limitations defense, and after the Registration Action had been underway for several months, Czarina filed an entirely new action in the District Court, this time against La Territorial, based on diversity of citizenship, and seeking to enforce the same New York default judgment (the "Enforcement Proceeding").

La Territorial responded by filing a motion to dismiss the Enforcement Proceeding, on the ground, among others,[2] that California's ten-year statute of limitations barred enforcement of the 1984 default judgment. However, before this motion could be heard, the District Court

[2] La Territorial also raised the issue of defective service in its Motion to Dismiss. However, since the court held that Czarina's complaint was barred by the statute of limitations, it did not reach the service issue. See, App., at 31, n.3. All references herein to "App." refer to the Appendix to the Petition.

in the Registration Action[3] denied Czarina's application for a judgment debtor's examination and vacated the registration, finding the action was barred by the ten-year statute of limitations. Because the District Judge in the Registration Action had already determined that enforcement of the judgment was time-barred, the District Judge dismissed the Enforcement Proceeding on res judicata grounds, while indicating that, had he reached the limitations issue, he would have arrived at a similar result. *See,* Order Granting Motion to Dismiss, App., at 30.

These two actions were consolidated for purposes of appeal. In the first of several critical misstatements, Czarina asserts that the Court of Appeals found the California tolling statute (Cal. Code Civ. Proc. sec. 351, "Section 351") to be unconstitutional as applied. Petition, at 1. In fact, the Court of Appeals never reached that issue, since it determined that the California tolling statute was inapplicable to this case, because La Territorial was a foreign corporation subject to substituted service of process. *See,* Memorandum, App., at 5.

Czarina next argues that amenability to service is only sufficient to render Section 351 inapplicable when it is coupled with the "minimum contacts" necessary to support the assertion of personal jurisdiction over the "absent" defendant. In essence, Czarina argues that the Court of Appeals' unpublished Memorandum misapplied a properly articulated rule of state law. Under California

[3] The two actions were pending before different judges in the Southern District of California. Because the Registration Action was a "miscellaneous" proceeding, it could not be consolidated at the trial level with the later-filed Enforcement Proceeding.

law, the Enforcement Action was time-barred and not even subject to tolling. As for the Registration Action, tolling under Section 351 is not applicable since personal jurisdiction in the district in which the judgment is to be registered is not necessary under 28 U.S.C. § 1963. Moreover, as the Court of Appeals found, La Territorial was amenable to service under the Inter-American Convention on Letters Rogatory, 28 U.S.C. § 1781. Czarina also argues that the failure to toll the statute of limitations discriminates against foreign judgments in violation of the full faith and credit and equal protection clauses of the United States Constitution. However, there is absolutely no discriminatory treatment – all properly recorded judgments (domestic and foreign) are subject to renewal after ten years. Here, Czarina's assignor did not register the judgment in California when it could have. The failure to do so does not create a constitutional violation.

ARGUMENT

I. The Court of Appeals Properly Affirmed the District Court's Dismissal of Czarina's Enforcement Proceeding.

Under California law, a proceeding to enforce a judgment must be brought within 10 years. Cal. Code Civ. Proc. sec. 683.020. This period is not subject to tolling. *Pratali v. Gates*, 4 Cal. App. 4th 632, 637, 5 Cal. Rptr. 2d 733, 736 (1992). The Enforcement Action was commenced in 1999 – 15 years after the entry of the 1984 default judgment. Therefore, while the Court of Appeals did not reach the issue, the Enforcement Proceeding clearly was barred by Cal. Code Civ. Proc. sec. 683.020. With respect to

the Enforcement Action, there is no need to consider whether La Territorial had been amenable to service, let alone subject to the personal jurisdiction of the California courts, during the entire statutory period.

II. The Court of Appeals Properly Held the Tolling Provisions of Section 351 Were Not Applicable to Czarina's Registration Action.

California law distinguishes enforcement proceedings from an action "on" a judgment. *Id.*, at 637. *See, also*, Cal. Code Civ. Proc. sec. 683.050: "Nothing in this chapter [enforcement and renewal of judgments] limits any right the judgment creditor may have to bring an action on a judgment, but any such action shall be commenced within the period prescribed by Section 337.5." Actions to register judgments under 28 U.S.C. § 1963 ("Section 1963") are treated under California law as actions "on" a judgment governed by the ten-year limitations period of Cal. Code Civ. Proc. sec. 337.5. *Marx v. Go Publishing Co.*, 721 F.2d 1272 (9th Cir. 1983). Unlike the absolute limitations period that governs enforcement proceedings (Cal. Code Civ. Proc. sec. 683.020), Section 337.5 is potentially subject to Section 351, which tolls the running of the ten-year limitations period against any "person" who is "out of the State when a cause of action accrues, or who "departs from the State" thereafter, until his "return".

This tolling statute was enacted in 1872, well before the post-*Pennoyer v. Neff* development of methods of substituted service and long-arm jurisdiction, and is itself subject to several exceptions carved out over the years by the California courts. Thus, for example, Section 351 will not toll the running of the statute of limitations for non-resident motorists (*Bigelow v. Smik*, 6 Cal. App. 3d 10, 15,

85 Cal. Rptr. 613, 616 (1970)) or limited partnerships (*Epstein v. Frank*, 125 Cal. App. 3d 111, 120, 177 Cal. Rptr. 831, 835 (1981)). The reason given for these exceptions was the availability of substituted service of process. *See, e.g. Bigelow*, 6 Cal. App. 3d at 13-14, 85 Cal. Rptr. at 615. In fact, the California Court of Appeal reasoned in that case that the legislature must have concluded that exceptions to Section 351 would be *implied automatically* in all cases where statutory provision had been made for alternative service of process. *Id.*, at 14-15, 85 Cal. Rptr. at 615

The California courts have similarly held that the availability of alternative provisions for service against foreign corporations also renders Section 351 inapplicable, since it is not necessary to toll the running of the statute of limitations in order to protect a resident plaintiff's right to sue in its home state. *Loope v. Greyhound Lines, Inc.*, 114 Cal. App. 2d 611, 614, 250 P.2d 651, 652 (1952). Contrary to Czarina's characterization, none of these cases were based on any constitutional considerations.[4] Rather, they simply represent a trend in California law toward restricting the scope of Section 351, which is itself an exception to the general policy of the statute of limitations.

Czarina attempts to distinguish between the concepts of amenability to service and personal jurisdiction,

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[4] The Ninth Circuit has held Section 351 to be unconstitutional when applied to toll the running of the statute as to nonresident individuals engaged in interstate commerce. *See Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990). Since that was not the situation before it in the case at bar, the Court of Appeals did not reach the commerce clause argument and thus did not rely on its reasoning in *Abramson*.

arguing that both must be present in order to excuse the application of Section 351 tolling. Czarina's argument ignores the fact that proceedings incident to the registration of a judgment under Section 1963 do not require the registration court to have personal jurisdiction over the judgment debtor. *See Dichter v. Disco Corp.*, 606 F. Supp. 721 (S.D. Ohio 1984).

A. The California State Courts Have Continued to Restrict the Scope of Section 351.

Because personal jurisdiction over La Territorial was not a prerequisite to registration of the judgment, there was no reason for the Court of Appeals to reach the constitutionality of Section 351, which the California courts have already largely restricted in its application to certain individual defendants.

That trend is in keeping with the original theory behind the statute of limitations, which is that, over time, the aggrieved party's right to bring suit is outweighed by the strong policy against burdening the defendant with an ancient claim. *See Wood v. Carpenter*, 101 U.S. 135, 139 (1879). Tolling statutes, such as Section 351, evidence a recognition that this overall policy should be mitigated by concern for plaintiffs suffering from a "disability" that prevents them from bringing suit in a timely fashion. Examples of such a "disability" affecting the legal capacity to act include individuals who are under the age of majority, insane or imprisoned. In order to alleviate the unfairness of strictly applying the statute of limitations in such situations, the California legislature enacted Section 351 in 1872. The defendant's absence from the jurisdiction was also considered to be a "disability" because, under this

Court's holding in *Pennoyer v. Neff*, 95 U.S. 714 (1877), no state could establish *in personam* jurisdiction over a party beyond that state's territorial limits. As explained by the California Supreme Court, the original purpose of applying Section 351 to toll the running of Cal. Code. Civ. Proc. sec. 337.5 was to protect *resident* plaintiffs from defendants who committed an act within the state and then disappeared. *Dew v. Appleberry*, 23 Cal. 3d 630, 591 P.2d 509 (1979).

Thus, as modern developments in the law such as constructive or substituted service have left fewer and fewer defendants outside the reach of the California courts, the perceived need for Section 351 has diminished, such that the principal remaining application of the statute is to individual defendants who leave the state and conceal themselves. In this case, throughout the entire time since entry of the 1984 default judgment, La Territorial has been "hiding in plain sight" at its corporate headquarters in Mexico City. California simply has no public policy interest in providing a forum for suits, like either of the proceedings Czarina initiated in this case, between two non-residents, which arose more than ten years earlier out of transactions which occurred entirely outside the state. Czarina cannot change the fact that it, a Delaware limited liability company with its principal place of business in New York, as the purported assignee of the liquidators of the London arm of an Israeli insurance company, is attempting to enforce a now 18-year-old default judgment originally rendered in New York against another insurance company with its principal place of business in Mexico. The purpose of a statute of limitations is to prevent stale claims, and is only overridden in special circumstances not even remotely present in this case. *See*

Cardoso v. American Medical Systems, Inc., 183 Cal. App. 3d 994, 228 Cal. Rptr. 627 (1986).

B. The Court of Appeals Correctly Found That There Is No Proof That La Territorial Was Not Amenable to Service Under The Inter-American Convention on Letters Rogatory.

Czarina complains that the lower courts improperly "shifted the burden of proof" by requiring it to demonstrate that La Territorial could not have been served by some method before it allegedly "entered" California in 1995. Petition, at 16-17. Czarina's argument is misplaced, for two reasons. First, since its whole case depends on the application of Section 351, which is an *exception* to the otherwise applicable statute of limitations, Czarina bears the initial burden of producing evidence on this point.[5]

Second, Czarina itself acknowledged that the Inter-American Convention, 28 U.S.C. § 1781, was available as a proper method of service on La Territorial beginning in 1988, when Mexico became a signatory. The Court of Appeals recognized, without expressly stating, that service on La Territorial was not required in the sense Czarina uses the term (*i.e.*, as a method of obtaining personal

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[5] Czarina correctly points out that the Enforcement Proceeding was dismissed at the pleading stage; it is less clear, however, that Czarina did not have an opportunity to submit evidence in connection with the Registration Action. Nevertheless, in speaking of "evidence", the Court of Appeals was clearly referring to the factual allegations of Czarina's pleadings.

jurisdiction) before the 1984 default judgment could have been registered.[6]

III. Because of the Summary Nature of the Registration Procedure Under Section 1963, the Registration Court Is Not Required to Acquire Personal Jurisdiction Over the Judgment Debtor.

There is no requirement that personal jurisdiction be established over the judgment debtor before a judgment may be "domesticated" by registration under Section 1963.[7] Once registered, it then becomes the equivalent of a California judgment, on which the judgment creditor can

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[6] This was implicit in the arguments La Territorial raised in the District Courts, and it is immaterial that the Court of Appeals did not expressly rule on that ground. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476, 99 S. Ct. 740, 750, n.20 (1979): "As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals."

[7] To the extent that Czarina suggests that due process requires personal jurisdiction to register the judgment in another state, it is mistaken. Indeed, in *Shaffer v. Heitner*, 433 U.S. 186, 210, 97 S. Ct. 2569, 2583, n.36 (1977), this Court held that

> Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.

levy execution any time it locates assets within the jurisdiction.

In *Dichter v. Disco Corp.*, 606 F. Supp. 721 (S.D. Ohio 1984), the judgment debtor challenged the constitutionality of Section 1963 on due process grounds, since he had no property, nor did he reside, in the district where the judgment had been registered. Thus, the defendant argued, "it offends the Constitution for a court to entertain an original action where it has no personal jurisdiction over the parties thereto." *Id.*, at 724.

The District Court, however, disagreed, concluding that "while there may well be constitutional limitations on registration of judgments under the statute, personal jurisdiction in the court of registration upon the date of registration is not one of them." *Id.*, at 725. The court based this conclusion on a review of the cases construing Section 1963, notably the opinion by Justice Blackmun in *Stanford v. Utley,* 341 F.2d 265 (8th Cir. 1965), which explained that "[t]he purposes of section 1963 were to simplify and facilitate the enforcement of federal judgments, at least those for money, to eliminate the necessity and expense of a second lawsuit, and to avoid the impediments, such as diversity of citizenship, which new and distinct federal litigation might otherwise encounter." *Id.*, at 270.

Czarina attempts to minimize the impact of *Dichter* by dismissing it as "a matter of first impression and without analysis". Petition, at 19, n.5. The fact that a case is the first to address a given issue says nothing about the validity of its conclusion, and the preceding discussion demonstrates that *Dichter* is hardly "without analysis". And, while it may be the only case to address this issue

under Section 1963, it is by no means the only authority for the proposition that it is constitutional for a judgment to be enforced in a foreign state without personal jurisdiction in that foreign state against the judgment debtor. See, *Shaffer v. Heitner, supra.*

Czarina also attempts to undermine *Dichter* by citation to the allegedly "parallel situation" of enforcement of foreign arbitral awards under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the U.N. Convention"). See, Petition, at 19, n.5. The problem with this argument is that the two situations are simply not "parallel". Precisely because Section 1963 deals with the enforcement of a judgment that was rendered by another federal court, the defendant has already benefited from due process and the other protections afforded by the Constitution. Thus, the subsequent registration can safely proceed in a streamlined fashion without undue fear of compromising the judgment debtor's rights. The same cannot, however, be said of an action to enforce a foreign arbitral award, since the fundamental integrity of the proceeding that generated the award is far less assured, and, therefore, subject to greater scrutiny under the Federal Arbitration Act, which implements the U.N. Convention. See, 9 U.S.C. § 207: "The Court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition and enforcement of the award specified in said Convention." The U.N. Convention, in turn, lists a variety of grounds for refusal, among them, that:

> the competent authority in the country where recognition and enforcement is sought finds that:

> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

U.N. Convention, Art. V(2).

Moreover, while registration applies by definition to a judgment that has already become final, an unconfirmed arbitration award is the functional equivalent of a contract right, and still must be converted to a judgment before it can be enforced.[8] Thus, it is entirely consistent with the nature of a foreign arbitration award to require the federal court where enforcement is sought to assert personal jurisdiction over the respondent. However, since these same concerns are not present in a registration proceeding under Section 1963, the cases construing the U.N. Convention add nothing to the discussion of the case at bar.

IV. Application of the Ten-Year Statute Of Limitations In This Case Does Not Violate The Full Faith and Credit And Equal Protection Clauses Of The United States Constitution.

Czarina contends that the failure to apply tolling under Section 351 discriminates against holders of foreign judgments. Nothing could be further from the truth. By

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[8] *See, e.g.*, Cal. Code Civ. Proc. sec. 1287.6: "An award that has not been confirmed or vacated has the same force and effect as a contract in writing between the parties to the arbitration."

using the renewal procedures available under California law (Cal. Code Civ. Proc. sec. 683.110), the foreign judgment creditor can potentially extend the life of a registered foreign judgment beyond that of the original, particularly when, as here, the state of rendition does not permit revival. *See Pratali v. Gates*, 4 Cal. App. 4th 632, 5 Cal. Rptr. 2d 733 (1992), discussing the interplay between California's 1982 Enforcement of Judgments Law (Cal. Code Civ. Proc. sec. 680.101 *et seq.*) and the separate action on a judgment under Cal. Code Civ. Proc. sec. 337.5. Thus, had Czarina's assignor simply registered the 1984 judgment before February 17, 1994, it could have then renewed it for an unlimited number of additional ten-year periods, all without the need to obtain personal jurisdiction over La Territorial. Thus, the only difference between California's treatment of resident and nonresident judgment creditors is the minimal requirement of initial registration; after that, the two are treated identically with respect to the right to renew their judgments. Yet, it is this very "inequity" that Czarina advances in support of its equal protection argument. Not only is Czarina not disadvantaged by California's treatment of sister state judgments, in this case, it stood to reap a benefit not available to it in its "home" court.

Czarina incorrectly argues that a foreign judgment creditor cannot take advantage of these procedures until it has commenced a separate action on the judgment. Petition, at 19. This argument misses the whole point of registration under Section 1963, which acts as a *substitute* for a full-blown action on the judgment. *See, Stanford v.*

Utley, 341 F.2d at 268.[9] Thus, when Halvanon, the original judgment creditor, first obtained the 1984 default judgment against La Territorial, in order to preserve the value of its New York judgment and maximize its chances of collecting, it needed only to register that judgment in the two or three other U.S. jurisdictions in which a Mexican insurer might reasonably be expected to do business, either then or in the future: California, Arizona and Texas. Halvanon (and later, Czarina) would then have had the flexibility to wait, if it wished, until La Territorial began "doing business" with the California broker, ADA VIS, in 1995. At that point, assuming Halvanon/Czarina had taken the minimal step of renewing the California judgment in 1994, it could have commenced proceedings to levy execution on any assets La Terriorial had within the jurisdiction.

The real problem here, and the reason Czarina now tries so hard to come up with a federal question where none exists, is that Halvanon did not act with any reasonable diligence to ensure future collectability of the 1984 default judgment, so that what it sold to Czarina in 1998 had very little value. Try as it may, Czarina cannot avoid the fact that it purchased the 1984 default judgment knowing full well that, as the Deed of Assignment from Halvanon's liquidators states: "They [La Territorial] have rigorously contested [the judgment's] validity and legal opinion advises that due to the age of the judgment it is

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[9] This is undoubtedly why the courts have characterized a registration proceeding under Section 1963 as an "action on a judgment", for purposes of identifying the applicable statute of limitations. See, *Marx v. Go Publishing Co.*, 721 F.2d 1272 (9th Cir. 1983).

now only enforceable in the state of New York." See, Order Denying Halvanon/Czarina's Ex Parte Application, etc., App., at 17.

The foregoing discussion demonstrates that Czarina has failed to make the showing necessary to support a grant of certiorari. It cannot legitimately point to any constitutional provision as the ground for the Court of Appeals' decision. Moreover, even assuming *arguendo* that the Court of Appeals erred in its reading of the facts alleged by Czarina, or in its application of those facts to the governing California law, such errors do not result in a deprivation of any constitutionally protected rights. In short, Czarina's actions were time-barred, and the Court of Appeals correctly affirmed the decisions of the District Courts.

Respectfully submitted,

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